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In The Supreme Court of the United States

MICHAEL W. SOLE, SECRETARY, FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION, *et al.*,

Petitioners,

v.

T.A. WYNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, PROFESSOR CATHERINE R. ALBISTON AND PROFESSOR LAURA BETH NIELSEN AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Given new empirical evidence that a narrow construction of the term "prevailing party" has undermined civil rights enforcement by both conservative and liberal public interest organizations, should the Court further restrict access to the judicial process by extending *Buckhannon* to preliminary injunctive relief?

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INTERESTS OF *AMICI CURIAE*[1]

This case concerns whether *Buckhannon* should be extended to civil rights actions that involve preliminary injunctive relief. Resolution of this action is likely to affect the ability of indigent civil rights plaintiffs to find representation and vindicate their rights in court. The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity ("Warren Institute"), as *amici curiae*, seeks to bring to the Court's attention new empirical research regarding *Buckhannon*'s effect on civil rights enforcement by private parties and on access to the judicial process for indigent victims of civil rights violations.

The Warren Institute is a multidisciplinary, collaborative venture to produce research, research-based legal and policy prescriptions, and curricular innovation on issues of racial and ethnic justice throughout the nation. The Institute's mission is to engage the most difficult topics related to civil rights, race, and ethnicity, providing valuable intellectual capital to public and private sector leaders, the media, and the general public while advancing scholarly understanding. Located at the Boalt Hall School of Law at the University of California, Berkeley, the Institute seeks to connect the world of scholarship with the world of civil rights litigation and policy debate so that each informs the other, while preserving the independence, quality, and integrity of the research enterprise. One

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[1] Pursuant to Rule 37.6, *amici* certify that no counsel for any party authored this brief in whole or in part. No person or entity other than *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), the parties have consented to the filing of the brief of *amici curiae*, and their letters of consent accompany this brief.

of the principal ways that the Warren Institute strives to add value to civil rights law and policy is by bringing timely and relevant empirical work to bear on complex legal issues. The instant brief exemplifies this approach.

Catherine R. Albiston is a professor of law at the University of California, Berkeley, where she specializes in the empirical study of law and social change. She is the primary author of the research presented in this brief.

Laura Beth Nielsen is a professor of sociology and law at Northwestern University and Research Fellow at the American Bar Foundation, where she specializes in empirical research about employment law and the legal profession. She is a coauthor of the research discussed in this brief.

SUMMARY OF ARGUMENT

This *amicus* brief reports new empirical research that indicates that the Court's narrow construction of the term "prevailing party" has undermined civil rights enforcement actions, particularly in cases that seek equitable relief. These data also indicate that limiting fee recovery has discouraged attorneys from representing indigent victims of civil rights violations, jeopardizing their access to the courts. Adopting a *per se* rule that preliminary injunctions can never confer prevailing party status would further undermine civil rights enforcement, and such a rule is not required by *Buckhannon*. Instead, this Court should recognize that preliminary relief can confer prevailing party status in appropriate circumstances.

First, *Buckhannon* does not require a *per se* rule that preliminary injunctions can never confer prevailing party status. *Buckhannon* held only that "enforceable judgments on the merits and court-ordered consent decrees" were sufficient to confer prevailing party status, and that the catalyst theory "falls on the other side of the line from these examples." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604-05 (2001). It remains an open question where that line lies, and preliminary injunctions are easily distinguishable from the catalyst theory because they require consideration of the merits, carry the judicial *imprimatur* of a court order, and are enforceable judgments from which an appeal may lie. 28 U.S.C. § 1292(a)(1); Fed. R. Civ. P. 54(a). Petitioners argue for an overinclusive *per se* rule that is not required by *Buckhannon* and that would undermine civil rights enforcement in a broad array of cases far beyond the facts of this case.

Second, new empirical research shows that *Buckhannon*'s narrow construction of prevailing party has substantially undermined civil rights enforcement, and that enforcement actions that seek equitable relief have been especially hard hit. For example, organizations that bring enforcement actions seeking equitable relief from state entities were seven times more likely than others to report negative effects from *Buckhannon*. Lawyers also report that defendants are capitulating before judgment in meritorious claims to avoid a final judgment and a fee award, and that the uncertainty of fee recovery has made lawyers unwilling to represent indigent plaintiffs in civil rights cases. Conservative and liberal organizations have been equally affected; there were no statistically significant differences in their reports of negative fallout from

Buckhannon. These data strongly suggest that a ruling that preliminary injunctive relief can confer prevailing party status in appropriate circumstances would mitigate *Buckhannon*'s negative effects on civil rights enforcement.

Third, a *per se* rule that preliminary injunctive relief can never confer prevailing party status would clog the courts with repetitive litigation and further undermine civil rights enforcement. Because obtaining preliminary injunctive relief involves consideration of the merits, a preliminary injunction signals the likely outcome of the litigation and will prompt defendants to capitulate before trial to avoid a final judgment and the accompanying fee award. Strategic capitulation not only deprives the plaintiff of fee recovery, it also defeats any final resolution of the case, producing repetitive, wasteful litigation. *Smyth v. Rivero* illustrates this problem, as it caps almost a decade of repetitive litigation with no final resolution of the underlying civil rights claim. The *per se* rule proposed by petitioners would be an open invitation for serial litigation like this that turns civil rights litigation into a perverse game of cat and mouse, wasting judicial resources and discouraging attorneys from representing indigent victims of civil rights violations.

Fourth, many civil rights actions involve time-sensitive relief that supports core elements of democratic society, such as preserving access to the franchise, protecting freedom of expression, and ensuring transparency of government through freedom of information. Often a preliminary injunction is the *only* form of success in these cases because once the election is over, the protest occurs, or the government produces the requested documents, these cases become moot through the operation of the preliminary injunction itself. Eviscerating fee recovery for

such important claims would subvert the important democratic values behind these laws and make plaintiffs in these cases victims of their own success.

Finally, a *per se* rule would adversely affect several circumstances in which prevailing party status is appropriate. The atypical facts of this case do not offer a suitable vehicle for evaluating these important policy questions, and consequently the Court may wish to consider dismissing certiorari as improvidently granted. At the very least, however, this Court should reject an overinclusive *per se* rule and leave these important questions for later resolution with an appropriate factual predicate.

ARGUMENT

I. An Overinclusive *Per Se* Rule that Preliminary Injunctions Never Confer Prevailing Party Status is not Required by *Buckhannon*.

Buckhannon does not require a *per se* rule that preliminary injunctions never confer prevailing party status. *Buckhannon* held that "enforceable judgments on the merits and court-ordered consent decrees create the 'material alteration of the legal relationship of the parties' necessary to permit an award of attorney's fee." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (internal citations omitted). The Court reasoned that the catalyst theory "falls on the other side of the line from these examples" because "a defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* at 605. The Court did not

hold that judgments on the merits and court-ordered consent decrees were the *only* forms of relief that confer the necessary judicial *imprimatur* to confer prevailing party status, but instead left open where the line lies. *Buckhannon* also did not address preliminary injunctions, which are easily distinguishable from the catalyst theory because they require consideration of the merits, carry the judicial *imprimatur* of a court order, and are enforceable judgments from which an appeal may lie. 28 U.S.C. § 1292(a)(1); Fed. R. Civ. P. 54(a) (a judgment includes "any order from which an appeal lies").

At issue in this case is whether, and under what circumstances, preliminary injunctive relief is sufficient to confer prevailing party status. As the empirical evidence discussed below shows, *Buckhannon*'s narrow construction of the term "prevailing party" has made lawyers who represent civil rights plaintiffs nervous about their ability to continue to do so and remain financially solvent. These data also indicate that the uncertainty over fees introduced by *Buckhannon* has been particularly problematic for civil rights plaintiffs who seek equitable relief. Petitioners argue for an overinclusive *per se* rule that would only exacerbate these problems and further undermine civil rights enforcement in a broad array of cases far beyond the facts of this case. With a narrower ruling, the Court can mitigate *Buckhannon*'s negative effects and avoid discouraging the civil rights enforcement actions Congress intended to promote by enacting Section 1988.

II. New Empirical Research Indicates that Restricting Fee Recovery has Undermined Civil Rights Enforcement by Both Conservative and Liberal Public Interest Organizations, Especially for Actions that Seek Equitable Relief.

When the Court decided *Buckhannon,* it considered whether restricting fee recovery would limit access to the courts and discourage plaintiffs with meritorious cases from filing suit, but concluded that these concerns were "unsupported by any empirical evidence." 532 U.S. at 608. The purpose of this *amicus* brief is to bring to the Court's attention new empirical research that indicates that these restrictions have discouraged enforcement actions and have made it more difficult for indigent plaintiffs to find representation. There were no differences between conservative and liberal public interest organizations on this point; both were equally, negatively affected. This research also suggests that enforcement actions that seek equitable remedies, such as injunctive relief against government actors, are the most likely to be undermined by a narrow interpretation of prevailing party.

The findings discussed below come from data from a national, representative survey of 221 public interest law organizations examining several facets of public interest practice in the United States. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. Rev. (forthcoming June 2007), *available at* http://ssrn.com/abstract=937114. Conducted in 2004, this survey asked, *inter alia*, whether *Buckhannon* had affected (positively or negatively) each respondent's ability to pursue its goals. *Id.* at 34. To obtain more detailed data about *Buckhannon*'s effects, the survey

also included a qualitative, open-ended question about how *Buckhannon* affected the respondent's practice. *Id.* at 39. The survey included additional questions about organizational size, budgetary reliance on attorney's fees, practice area subject matter, investment in impact litigation, political orientation of the organization, and the effects of recent sovereign immunity decisions on the organization.[2] *Id.* at 35-36.

The researchers conducted a multivariate analysis of the quantitative data to determine which factors relate to whether an organization was negatively affected by *Buckhannon*, controlling for organizational size and the organization's budgetary reliance on attorney's fees. In conducting this analysis, the study investigated a concern raised in *Buckhannon* that defendants would capitulate before judgment to moot the case and avoid a fee award, a maneuver the researchers called "strategic capitulation." *See Buckhannon*, 532 U.S. at 608. With this concern in mind, the researchers anticipated that certain factors would be related to negative fallout from *Buckhannon*. First, they expected that organizations that invest significant efforts into impact litigation would become more vulnerable to fee loss because impact litigation typically involves claims for broad injunctive relief, such as a change in policy, rather than individual damages claims that insulate against strategic capitulation. Second,

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[2] The survey was administered by a professional survey center to a random sample of public interest organizations in the United States, and had a very strong 82 percent response rate. Albiston & Nielsen, *supra*, at 32. For more detail on the study's methodology, *see id.* at 29-32; Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. Rev. 1591, 1601-05 (2006).

because sovereign immunity generally prevents organizations that litigate against state entities from bringing damages claims to fend off strategic capitulation, the researchers expected that organizations that were affected by the Court's recent sovereign immunity decisions would also be more likely to be negatively affected by *Buckhannon*. Finally, the researchers anticipated that enforcement actions in the civil rights, environmental, and poverty areas, would be more likely than others to involve solely equitable relief, and therefore become more vulnerable to strategic capitulation. Accordingly, they expected that organizations that practice in those subject areas would be more likely to be negatively affected by *Buckhannon* than those that do not. *See* Albiston & Nielsen, *supra*, at 32-34.

The results of these analyses are reported in detail in the forthcoming article, but can be briefly summarized here. After controlling for certain characteristics, such as organizational size and budgetary reliance on attorney's fees, the factors outlined above – investment in impact litigation, negative effects from the sovereign immunity decisions, and practicing in the areas of civil rights, environmental, or poverty law – all were positively, significantly associated with negative fallout from *Buckhannon*.[3] *Id.* at 36-39 & Table 3. In fact, organizations that were negatively affected by the sovereign immunity decisions were seven times more likely than others to report negative effects from *Buckhannon,* and those that practice in

[3] These effects were robust across different specifications of the statistical model, and significant at the $p<.01$, or, in the case of the sovereign immunity variable, $p<.001$ level. Albiston & Nielsen, *supra*, Table 3.

the areas of civil rights, poverty, and environmental law were more than seventeen times more likely than others to report these negative effects. *Id.*, Table 3.

These quantitative data indicate that plaintiffs who seek solely injunctive relief, such as claims against state actors seeking a change in policy, are particularly vulnerable to fee loss after *Buckhannon*, a result consistent with strategic capitulation. These equitable actions also seek the forms of relief that are most likely to have broad effects in the public interest. This finding strongly suggests that clarifying that preliminary relief can confer prevailing party status, at least when the defendant's actions deprive the plaintiff of the opportunity to obtain final adjudication of the merits, would help to mitigate *Buckhannon*'s negative effects on civil rights enforcement.

In addition to these quantitative data, the researchers collected qualitative data by asking how *Buckhannon* affected these organizations. The organizations' responses were illuminating. First, strategic capitulation is a substantial concern, as this comment from one respondent illustrates:

> [*Buckhannon*] allows the federal defendants, who we frequently litigate against, to make strategic decisions to moot out cases before a final judgment has been entered and as a result we are often unable to recover attorney's fees in cases that we've made substantial investments in. *Id.* at 39.

Second, respondents report that they are less likely to take on enforcement actions. One respondent stated the calculus succinctly: "*Buckhannon* makes us less likely to do cases because we can't get attorney's fees." *Id.* at 41.

Third, respondents reported that it is more difficult to find attorneys to whom they can refer promising claims, as this respondent describes:

> [N]ow with that hurdle it just means that it's harder for us to refer cases to attorneys who may in the past have taken attorneys cases that they thought may get attorney fees. But now says, "Hey, I got one more hurdle to take. I'm not, I'm not willing to invest the time and energy in it." *Id.*

These qualitative responses indicate that attorneys are turning away plaintiffs in enforcement actions, much like the situation Congress confronted when it enacted Section 1988. Congress enacted Section 1988 in response to the Court's ruling in *Alyeska* that federal courts lacked the power to award fees to prevailing parties absent specific statutory authorization. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). *Alyeska* had a "devastating" impact on civil rights enforcement because after *Alyeska* limited fee recovery, private attorneys began to refuse to take on civil rights cases. H.R. Rep. No. 94-1558, at 3 (1976). Congress found that "a vast majority" of civil rights claimants could not afford legal counsel and were suffering "very severe hardships" as a result. *Id.* at 1-2. Much like the situation after *Alyeska*, this research indicates that the Court's narrow construction of prevailing party has put access to the judicial process for indigent plaintiffs in serious jeopardy. A *per se* rule that preliminary injunctive relief could never support a fee award would further erode the ability of indigent civil rights claimants to find representation, thus undermining the primary goal behind Section 1988.

One final finding underscores how fee shifting statutes support enforcement actions across the political spectrum. Among public interest organizations in this study, there were no significant differences between conservative and liberal organizations in their reports that *Buckhannon* has hindered their work; both groups were equally affected. Albiston & Nielsen, *supra,* at 43. This finding is not surprising given that conservative public interest organizations have enjoyed considerable success in recent civil rights cases, including actions seeking equal access to public facilities for religious groups and challenging affirmative action programs. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (Center for Individual Rights); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Mountain States Legal Foundation); *Lamb's Chapel v. Ctr. Moriches Union Free Sch.*, 508 U.S. 384 (1993) (American Center for Law and Justice). Enforcement actions such as these, which typically seek equitable relief, are now structurally vulnerable to strategic capitulation.[4]

Taken together, these findings suggest that the effects of limits on fee recovery are not about conflict between conservative and liberal political factions, but instead

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[4] Although the data reported here relate only to public interest organizations, this does not undermine these findings; quite the contrary. The dynamics suggested by these data also apply to privately-represented litigants who bring solely equitable claims. The implications of limiting fee recovery may be far worse for these plaintiffs because unlike public interest organizations that sometimes receive foundation grants or charitable contributions, private lawyers typically rely exclusively on attorney's fees to support their practice. Of course, public interest organizations often litigate landmark cases that affect many people, so even if these effects were limited to these organizations, the impact would still be substantial.

represent a shift away from private enforcement of rights and toward government power, both to resist civil rights mandates and to control the enforcement, and ultimately the meaning, of those rights. Such a shift would result in very different incentives for bringing enforcement actions. For example, relying heavily on government enforcement would leave enforcement decisions vulnerable to the political whims of changing administrations and to the budgetary constraints of underfunded administrative agencies. Also, the sheer magnitude of the task is daunting. Private parties bring more than ninety percent of civil rights enforcement actions. *See* Albiston & Nielsen, *supra*, at 2 & n.6. If restricting access to fee recovery reduces private enforcement efforts, as the data reported here suggest that it will, it would require a massive infusion of government resources to replace the decentralized private attorney general system. Indeed, when Congress enacted Section 1988, it recognized that "fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy." S. Rep. No. 94-1011, at 4 (1976). Also, in some instances, the interests of federal and state actors may align against enforcing particular rights, even if such an enforcement action would be in the public interest. For these reasons, allowing injunctive relief to confer prevailing party status in appropriate circumstances is essential to preserve vigorous private enforcement of rights.

These dynamics are important because Congress intended Section 1988 to address both underenforcement by governmental entities and the imbalance of power between civil rights plaintiffs and government defendants. Congress was especially concerned about undermining

private enforcement actions precisely because civil rights enforcement depends so heavily on private suits due to the limited authority and resources of government enforcement agencies. S. Rep. No. 94-1011, at 3; H.R. Rep. No. 94-1558, at 1. When government entities are defendants, Congress intended Section 1988 to level the playing field between government officials and less powerful civil rights plaintiffs, noting that "governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves." H.R. Rep. No. 94-1558, at 7. Far from disapproving fee awards from tax payer funds, Congress found that "[t]he greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities." *Id.* A *per se* rule would undermine these important goals, thwarting the congressional purpose behind Section 1988.

III. A Rule that Preliminary Injunctive Relief Can Never Confer Prevailing Party Status Would Clog the Courts with Repetitive Litigation and Undermine Civil Rights Enforcement.

Petitioners' argument for a *per se* rule raises a significant policy question: the extent to which defendants can defeat appropriate fee awards through strategic capitulation. Here, the practical realities with regard to fee shifting and preliminary relief illustrate why attorneys will hesitate to take on civil rights enforcement claims if the Court extends *Buckhannon* to preliminary injunctive relief. The concern is that defendants who are faced with likely adverse judgments will defeat fee petitions in meritorious claims by providing the requested relief just

before judgment is entered, thus mooting the case. If this strategy becomes common, attorneys will be reluctant to invest time and resources representing indigent civil rights plaintiffs.

As this Court recognized in *Buckhannon*, strategic capitulation is a problem in claims for equitable relief. *See* 532 U.S. at 608. There is reason to believe that equitable claims, particularly in civil rights claims against states, may be becoming more common. After this Court's recent decisions regarding state sovereign immunity, many civil rights actions against states may *only* seek prospective relief. *See, e.g., Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 80 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001). Plaintiffs in actions such as these cannot choose to include a damages claim to avoid strategic capitulation; in fact, they are prevented from doing so.

If this Court extends *Buckhannon* to preliminary relief, preliminary injunctions will invite strategic capitulation in civil rights actions that seek equitable relief. Because obtaining preliminary relief involves consideration of the merits, a preliminary injunction is an important signal about the likely outcome of litigation. A plaintiff who obtains a preliminary injunction becomes especially vulnerable to strategic capitulation because the injunction will prompt wise defendants to change course before trial to avoid a final judgment and the accompanying fee award. Note that the aggregate effect on the universe of civil rights plaintiffs is the problem here. Although in the short run, an individual plaintiff might obtain relief from strategic capitulation, in the long run, attorneys will hesitate to take on important civil rights cases that require time-sensitive relief if they know that obtaining a needed preliminary injunction risks strategic

capitulation. The problem is compounded if the claim requires a significant investment of time and resources, as many institutional reform actions do. This dynamic undermines the entire Section 1988 framework, which is intended to address both individual and collective interests. Indeed, it is concern over this potential negative effect on access to the judicial process that has led some states to reject the *Buckhannon* approach in their jurisdictions. *Graham v. DaimlerChrysler Corp.*, 101 P.3d 140, 148-49 (Cal. 2004); *see also Teeters v. Div. of Youth & Family Serv.*, 904 A.2d 747, 753 (N.J. 2006).

Smyth v. Rivero, the lone circuit authority that holds that preliminary injunctions cannot confer prevailing party status, in fact illustrates the problem of strategic capitulation. *Smyth ex rel. Smyth v. Rivero,* 282 F.3d 268 (4th Cir. 2002). *Smyth* involved a challenge by AFDC recipients to a Virginia policy that required welfare applicants to identify the father of any child for whom they requested aid, or to provide the names of all persons who might be the father. *Id.* at 271. After finding that the state's decision to deny benefits to the plaintiffs under this policy contradicted federal regulations, the district court preliminarily enjoined enforcement of the policy, and the plaintiffs moved for summary judgment. *Id.* at 272. One day before the summary judgment hearing, the Virginia Poverty Law Center, which represented the indigent plaintiffs, agreed to continue the hearing on condition that the state would not seek repayment of benefits already paid to its clients. *Id.* at 273. The state then modified the policy to be prospective only so that it no longer applied to the plaintiffs. *Id.* The district court dismissed the claim as moot, but granted plaintiffs' motion for fees under Section 1988. *Id.* The Fourth

Circuit reversed, finding the preliminary injunction was not sufficient to support a fee award after *Buckhannon*. *Id.* at 284-85.

The history of this case illustrates the waste of resources involved when defendants engage in procedural maneuvering to avoid adjudication of the merits and a fee award. This was not the first time that the Virginia Poverty Law Center brought such an action against the state of Virginia and obtained a preliminary injunction against enforcing the policy, nor was it the first time the action was rendered moot by the defendant's unilateral conduct. *See Smyth v. Carter*, 168 F.R.D. 28, 32-33 (W.D. Va. 1996) (granting preliminary injunction against denying benefits based solely on recipients' inability to provide paternity information); *Smyth v. Carter*, 88 F.Supp. 2d 567, 571 (W.D. Va. 2000) (finding action moot after defendants amended the policy so that it no longer applied to plaintiffs). Still, despite repeated litigation over nearly a decade, the underlying policy remained in force without any adjudication on the merits because the defendant repeatedly changed its policy to moot the claim *with respect to these particular plaintiffs only.* By mooting the case in this way in *Smyth v. Rivero*, the state not only avoided substantially changing the policy, but also destroyed any possibility for the fee recovery that creates incentives for attorneys to represent indigent plaintiffs like these.

A *per se* rule denying fee awards for preliminary relief would be an open invitation for serial litigation such as this that turns civil rights litigation into a perverse game of cat and mouse, wasting judicial resources and discouraging attorneys from representing indigent plaintiffs with meritorious claims. Indeed, "satellite litigation" over fees

pales in comparison to the repetitive litigation that would result from strategic capitulation like that in *Smyth*. Of course, it is possible that denying fee recovery for preliminary relief will reduce litigation by discouraging disadvantaged victims of civil rights violations from bringing claims in the first place, but this is hardly what Congress intended by authorizing fees to prevailing parties in civil rights cases. For this reason, the more measured approach taken by other circuits, which recognize that preliminary relief can confer prevailing party status in appropriate circumstances, is more appropriate and more consistent with congressional intent behind Section 1988. *See, e.g., Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 945-946 (D.C. Cir. 2005) (finding plaintiffs were prevailing parties entitled to fees when the defendant capitulated after plaintiffs obtained a preliminary injunction); *Watson v. County of Riverside*, 300 F.3d 1092, 1096-97 (9th Cir. 2002) (finding plaintiff was a prevailing party entitled to fees when the claim on which the plaintiff prevailed became moot by operation of the preliminary injunction).

IV. Denying Prevailing Party Status to Certain Civil Rights Plaintiffs who Obtain Time-Sensitive Relief Would Subvert Important Democratic Values.

Many civil rights actions involve time-sensitive relief that supports core elements of democratic society, such as preserving access to the franchise, protecting freedom of expression, and ensuring transparency of governance through freedom of information. In these instances, a preliminary injunction is often the *only* form of success because the order provides the relief requested in the complaint and the case becomes moot by effect of the

injunction. For example, when a plaintiff secures a preliminary injunction that allows a civil rights protest to take place, once the protest is over the case often becomes moot. *See, e.g., Mahoney v. Babbitt*, 113 F.3d 219, 223 (D.C. Cir. 1997) (discussing a preliminary injunction allowing a Christian group to display banners critical of President Clinton's abortion policies along the route of the inaugural parade, and noting that "[f]or obvious practical reasons, [prior restraint First Amendment cases] normally arise in the context of preliminary injunctions"). Similarly, when a plaintiff secures an order requiring the government to produce documents pursuant to the Freedom of Information Act, once the government produces those documents, the case often becomes moot. *Cf. Carter v. Veterans Admin.*, 780 F.2d 1479, 1481 (9th Cir. 1986) (holding an action seeking an injunction directing the government to provide documents is mooted by production of the documents); *Kaye v. Burns*, 411 F.Supp. 897, 902 (S.D.N.Y. 1976) ("It is inconceivable, however, that the recovery of attorneys' fees could be foreclosed whenever the government chooses to moot an action under the Freedom of Information Act by supplying, during the pendency of the litigation, the material sought in the complaint. . . . To hold otherwise would be to inject an absurd requirement . . . that a case necessarily proceed to final judgment before an award of attorneys' fees may be made.").

When Congress enacted fee-shifting provisions to cover these situations, it intended to encourage enforcement actions that help to preserve these core democratic values. Congress was well aware that certain civil rights actions by their very nature may never result in a final judgment, and it was quite clear that fee awards should nevertheless be available for preliminary relief in appropriate circumstances. Congress explicitly stated that "[t]he

phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, at 7. The term also includes a plaintiff who succeeds "even if the case is concluded prior to a full evidentiary hearing before a judge or jury." *Id.* Congress also noted that "after a complaint is filed, a defendant might voluntarily cease the unlawful practice," and that in these circumstances "a court should still award fees even though it might conclude . . . that no formal relief, such as an injunction, is needed." *Id.* Thus, "the word 'prevailing' is not intended to require the entry of a *final* order before fees may be recovered," *id.* at 8 (emphasis in the original), and awards are appropriate when the plaintiff has "prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." S. Rep. No. 94-1011, at 5.

Congress clearly did *not* intend that plaintiffs be deprived of prevailing party status simply because the relief they sought was time sensitive. And of course defendants are not helpless in these situations; they can immediately appeal orders granting preliminary relief. 28 U.S.C. § 1292(a)(1). To eviscerate fee recovery in such important cases would subvert the important democratic values behind these laws.

V. A Preliminary Injunction Can Confer Prevailing Party Status in Appropriate Circumstances.

This Court should reject a *per se* rule that preliminary injunctive relief can never confer prevailing party status.[5]

[5] To argue, as petitioners do, that a clear rule is needed does not answer the question of what the content of that rule should be. A

(Continued on following page)

Such a rule would be vastly overinclusive, as there are at least three classes of cases in which prevailing party status is appropriate that would be adversely affected by such a *per se* rule: (1) circumstances in which the preliminary injunction signals the likely success of the plaintiff and the defendant capitulates in response; (2) circumstances in which the preliminary injunction provides the relief sought in the action and the case becomes moot by operation of the injunction; and (3) situations in which the preliminary injunction gives the plaintiff some, but not all, of the relief she seeks. Congress intended all of these circumstances to confer prevailing party status when it enacted Section 1988. *See* H.R. Rep. No. 94-1558, at 7 (stating that the fact that defendants voluntarily cease unlawful practices or the case does not go to trial should not defeat a fee award); S. Rep. No. 94-1011, at 5 (stating that a fee award is appropriate if the plaintiff prevails on any important matter even if he does not prevail on all issues).

Denying fee recovery is particularly inequitable when the defendant's own actions deprive the plaintiff of the opportunity to obtain a final judgment on the merits, and petitioners wisely acknowledge that such a result is not required by the facts presented here. *See* Petr.'s Br. 32 & n.21. Strategic capitulation presents a plaintiff who has invested time and resources into obtaining preliminary relief that furthers the public interest with a truly Pyrrhic victory. Any remedy the plaintiff obtains in this way is substantially diminished by the fact that she must bear

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blanket rule that preliminary injunctions *always* confer prevailing party status, with the appropriate fee (if any) left to the discretion of the district court, also provides a bright line rule that better serves the congressional purpose behind Section 1988.

her own costs of enforcement, thus eviscerating the intent behind the fee-shifting provision. *See* S. Rep. No. 94-1011, at 2 ("[C]itizens must have the *opportunity* to recover what it costs them to vindicate these rights in court.") (emphasis added). Perhaps more of concern, in the long run such a dynamic will ensure that far fewer civil rights enforcement actions will be brought in the first place. As the research presented in this brief attests, attorneys understandably are reluctant to take on meritorious claims for equitable relief when defendants can easily and unilaterally defeat fee recovery.

Denying prevailing party status to plaintiffs when the case becomes moot by operation of the preliminary injunction itself would make such plaintiffs victims of their own success. To preclude prevailing party status in these cases would eviscerate fee recovery in entire classes of enforcement actions that further core democratic values, such as actions to protect freedom of expression, to obtain information from the government, or to preserve access to the franchise. It would be particularly perverse to deny fee recovery in such important civil rights actions simply because by definition, obtaining the very relief the plaintiffs sought rendered the action moot.

When a preliminary injunction does not confer *any* of the relief the plaintiff sought from the defendant and a final, adverse ruling against the plaintiff is eventually entered, it may well be that conferring prevailing party status is inappropriate, but *amici* do not believe that situation is presented here. A more accurate characterization is that the respondent obtained some, but not all, of the relief she sought from petitioners, and therefore this case fits within the third category of cases outlined above. Comparing the relief sought in the complaint with the

relief the respondent actually obtained from the petitioners as a result of the court's order indicates that the respondent obtained at least some of the relief she sought. *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (holding that success on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit confers prevailing party status). The complaint in this action requested seven different forms of relief (apart from attorney's fees), including "injunctive relief prohibiting defendants from denying or otherwise interfering with the creation of a temporary art installation comprised of nude bodies in the form of a peace sign in MacArthur Beach State Park on February 14, 2003." Compl., ¶ 43(a). The district court granted the respondent's request for a preliminary injunction permitting this protest, ordering that "Defendants shall neither prevent nor interfere with Plaintiff's planned event on February 14, 2003." *Wyner v. Struhs*, 254 F.Supp. 2d 1297, 1304 (S.D. Fla. 2003). Petitioners chose not to appeal that ruling and the protest went forward on February 14, 2003, thus providing the respondent with all of the relief that she requested in paragraph 43(a) of the complaint. Indeed, had the respondent requested only the relief in paragraph 43(a), there would be no question that she had prevailed in this action.

It is well established that complete relief is not required to obtain prevailing party status. Where a plaintiff obtains some, but not all, of the relief she seeks, she "has crossed the threshold to a fee award of some kind," even if no final adjudication of the merits ever takes place. *Tex. State Teachers Ass'n,* 489 U.S. at 791-92; *see also Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). This Court has held that district courts should exercise their discretion in

circumstances such as these to award fees that are proportionate to the degree of success enjoyed by the plaintiff. *Hensley*, 461 U.S. at 436-37. The judge who presides over a case also hears the fee petition, and thus is in the best position to evaluate the relative success of the plaintiff and to balance the competing equities in the context of the case. What fee, if any, is appropriate is a decision that can be safely left to the discretion of the district court. Indeed, there is no evidence that judges have abused their discretion in awarding fees that are proportionate to plaintiffs' success.

Unfortunately, the case at hand does not provide a suitable vehicle for sorting out these difficult policy issues. This is not a situation in which the trial court granted a preliminary injunction that merely preserved the status quo and then ultimately ruled for the defendants at trial. Nor is it a case in which the defendant's actions or the operation of the preliminary injunction itself rendered the entire claim moot; these are the kinds of claims that raise serious concerns about preserving incentives for attorneys to represent indigent civil rights plaintiffs. Instead, the case at hand at best offers up convoluted facts in which the respondent obtained some of the relief she sought in the complaint, but intervening factual developments affected the court's later decision on her other requests for relief. To complicate matters further, this case also involves difficult distinctions between facial and as applied challenges in the First Amendment context. Given that this case does not clearly or cleanly present the key policy issues regarding prevailing party status and injunctive relief, the Court may wish to consider dismissing certiorari as improvidently granted, or remanding for further proceedings. At the very least, however, this Court should

reject an overinclusive *per se* rule and leave these important questions for later resolution with an appropriate factual predicate.

CONCLUSION

For these reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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